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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

KRAFT FOODS COMPANY OF WISCONSIN, *et al.*,
Petitioners,

v.

COMMODITY CREDIT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Kraft Foods Company of Wisconsin, The Borden Company, The Cudahy Packing Company, Armour and Company, The Berst Corporation, Safeway Stores, Incorporated, H. J. Heinz Company, and L. D. Schreiber & Co., Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on April 29, 1959.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin is reported at 164 F. Supp.

168, and appears at App. 985.[1] The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 266 F.2d 254, and appears at Appendix B, *infra*, p. 28.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1959 (Appendix B, *infra*, p. 46). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Seventh Circuit err in attributing unwarranted significance to the denial by the Supreme Court of a petition for a writ of certiorari to review a decision of the Court of Appeals for the Fourth Circuit in *Swift & Co. v. United States*, 358 U.S. 837, No. 270, October Term, 1958, which involved transactions similar to those in the case at bar?

2. In deciding that the transactions between Commodity Credit Corporation (CCC) and petitioners in the case at bar did not constitute "purchases" within the meaning of the Agricultural Act of 1949, did the Court of Appeals for the Seventh Circuit err in specifically rejecting the plain meaning under the law of sales of the word "purchase" and substituting therefor an undefined standard, which it calls a "normal meaning"?

STATUTES INVOLVED

The statutes involved are the Agricultural Act of 1949, 63 Stat. 1051 (1949), 7 U.S.C. §§ 1421-1450, and the Commodity Credit Corporation Charter Act, 62 Stat. 1070 (1948), 15 U.S.C. §§ 714-714o. Relevant portions of these statutes are printed in Appendix A, *infra*, pp. 21-7.

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1. "App." refers to Petitioners' Appendix in the Court of Appeals, nine copies of which have been filed with this Petition.

STATEMENT

Five years before the events here in question Congress enacted the Agricultural Act of 1949 (herein called the "Act"), which imposed on the Secretary of Agriculture the duty to provide "price support" for milk, butterfat, and the products of milk and butterfat at a level not less than 75% nor more than 90% of parity, and directed him to set that level at the beginning of each marketing year and to maintain the announced level throughout that year. Because milk is so highly perishable, the Secretary was instructed to provide that support "through loans on, or purchases of, [not milk but] the products of milk and butterfat," *e.g.*, cheese and butter. Such purchases may be made, the Act provides, through CCC.[2] Apart from these specific requirements of the Act itself, "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary . . ." and the determinations so made "shall be final and conclusive" (App. A, *infra*, pp. 21, 23-4).

Pursuant to the Act the Secretary designated the twelve-month period April 1 through March 31 as the marketing year, and thereafter announced the level of price support several weeks in advance of each marketing year. The price did not change appreciably in the first four years of the program because the support level for milk was set and

2. CCC is a federal corporation established as an agency and instrumentality of the United States within the Department of Agriculture, and its Board of Directors is subject to the general supervision of the Secretary of Agriculture; under its charter CCC has broad power to support the prices of agricultural commodities by means of "loans, purchases, payments, and other operations" (App. A, *infra*, pp. 25), but the Solicitor of the Department of Agriculture has construed the Act as limiting this authority, when applied to dairy prices, to the methods specified in the Act, *i.e.*, loans and purchases (App. 828-37, see also 846-51), and this interpretation is not in dispute here.

remained at the maximum statutory level, 90% of parity. CCC purchased and stockpiled large quantities of milk products between 1950 and 1953.

Congress gave the Secretary the power to minimize the net cost of CCC's purchases by providing that CCC "may sell any farm commodity owned or controlled by it at any price not prohibited by [the Act] . . ." (App. A, *infra*, p. 21). The Secretary has interpreted the Act to mean that CCC can sell at any price that will not interfere with the support price in effect at the time of the sale and accordingly CCC has followed the practice of selling its milk product holdings at prices slightly higher than the current support price (App. 1021; 236-7, 242-3, 245-8, *e.g.*, 636-43). In this manner large quantities of dairy products bought from the industry under the price support program have been sold back to the industry in time of shortage or rising prices. Still larger amounts have been sold in non-commercial channels or were given away for charitable purposes (App. 236-41; App. A, *infra*, p. 23).

Stockpiling in the first three years of the program had been gradual and manageable, but due to a combination of unforeseen circumstances unprecedented expansion of these stockpiles in the marketing year 1953-54 threatened serious harm to the economy (App. 249-50).

At the 1953-54 support price the commercial market fell far short of absorbing the plenteous supply of milk and butterfat produced during the 1953-54 marketing year. Consequently manufacturers of dairy products multiplied their sales to CCC. For example, in the first ten months under the 1953-54 program, CCC purchased 241,000,000 pounds of cheese, whereas in the entire preceding four years it had purchased only 211,000,000 pounds (App. 649). The entire industry was aware that a downward

change in the support program for the coming year was inevitable.

On February 15, 1954, the Secretary, acting after exhaustive economic and legal study of the problem, announced that he would reduce the support level from 90% to 75% of parity effective April 1, 1954. The corresponding prices that CCC would pay for cheese and butter in the coming year were announced three days later: beginning April 1, 1954, the CCC purchase price for cheese would be dropped $4\frac{3}{4}$ cents a pound, for butter, $8\frac{1}{4}$ cents a pound (App. 1031).

The Secretary's announcement had an immediate impact on petitioners, members of the dairy industry, who, acting individually, made plans which involved two steps: (a) reducing the prices paid cheese-makers for the cheese they would purchase in the latter part of the 1953-54 marketing year to a level consistent with the lower support prices which would become effective on April 1, 1954, and (b) selling as much of their higher cost cheese as possible to CCC under the existing and admittedly lawful programs before the April 1 price drop.

The Secretary, knowing that the economic situation would inevitably result in the creation of such plans, acted to bolster up the price support program and to reduce the expense of its administration. His objectives were twofold: (1) to make it possible for all cheese and butter produced before April 1 to be sold to CCC at the 1953-54 price, and (2) "to maximize the consumption in commercial outlets and to minimize the cost of the program" by encouraging commercial repurchase of the products in the 1954-55 marketing year (App. 246-8). In addition to amending existing procedures to implement his plans, there was

issued on March 9 an announcement called Da-112.[3] It was pursuant to announcement Da-112 that the transactions here in dispute took place.

Under Da-112, holders of cheese and butter were invited to submit offers to sell their holdings to CCC. The offers had to be submitted in time for acceptance by CCC prior to the close of business on March 31, 1954, the end of the 1953-54 marketing year. The offers had to state the quantities offered, their grade, the number and description of the containers and the locations at which the products would be held for CCC. With reference to delivery and transfer of title, Da-112 provided as follows in respect of cheese:

> "Cheese offered under this announcement must be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later, subject to its meeting the quality requirements set forth herein, as later evidenced by certificates issued by USDA which may be dated after March 31, but not later than April 30, 1954." (App. 668, paragraph 9)[4]

Unlike the standing regulations, under which sales to CCC and repurchases from CCC were covered by two separate contracts, Da-112 required those offering products to CCC in March to agree in the same contract to buy back

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3. The existing procedures were pursuant to announcements Da-99 (relating to CCC purchases of butter) and Da-100 (relating to CCC purchases of cheese) and Da-107 (relating to CCC's standing offer to sell milk products at prices higher than the current support price). The full texts of these announcements appear in the Appendix: Da-99 at pp. 616-25; Da-100 at pp. 626-34; Da-107 at pp. 635-43; Da-112 at pp. 662-71; and the March 9 amendments to Da-99 and Da-100 at pp. 659-61.

4. Title to butter passed to CCC upon acceptance by CCC of the offer, inasmuch as butter was required to have been graded prior to being offered.

the same product in April. These repurchase provisions constitute the only thing that is unique in Da-112.[5]

Relying upon Da-112 and in accordance with its provisions, petitioners offered large quantities of cheese and butter to CCC at the 1953-54 support prices and at the same time offered to repurchase them from CCC after the expiration of the 1953-54 marketing year. At no little expense to themselves, they complied strictly with every provision of that announcement. Their commodities met the required specifications, were packaged as directed, were submitted to Government inspection as required, and were inspected and graded in accordance with the Department regulations. Thereafter they were retained in storage for the specified period and were not returned to the commercial market before April 1. Only after complete performance on their part did petitioners receive the sums of money which the Department of Justice here seeks to recover (App. 1042; 189, 466, 474-5, 495, 514, 528-31).

In electing to accept the invitation of CCC to enter into these contracts under Da-112, petitioners passed up the opportunity of pursuing the plans they had formulated prior to the promulgation of Da-112 (App. 464-6, 520, 549).

On May 8, 1956, the Department of Justice demanded of petitioners (and over one hundred other companies which had engaged in Da-112 transactions) that they repay to CCC the sums paid to each by CCC for the asserted reason that the Da-112 transactions exceeded the Secretary's statutory authority. The Department of Justice then began to sue selected participants in the Da-112 transactions for

5. Exs. 65-67 (App. 863-79, 951-84) are examples of typical transactions under Da-112, and under the combined use of Da-100 and Da-107; it can be seen that the same result is obtained by using Da-100 and Da-107 as by using Da-112 alone, *i.e.*, Da-112 was simply a "streamlining" of the established procedures (App. 265, 272, 580).

recovery of the money paid under Da-112,[6] and petitioners filed their actions, pursuant to 28 U.S.C. § 2201 and 15 U.S.C. § 714(b), seeking declaratory judgments as to the validity of the Da-112 transactions.

At the trial, three officials of the Department of Agriculture took the stand as witnesses in behalf of petitioners. The Department and CCC have steadfastly maintained that the Da-112 transactions were authorized and valid, despite attacks upon the procedure by a congressional committee and by the Department of Justice (App. 368; 216, 327, 431).

The District Court held that the Secretary of Agriculture acted illegally in carrying out the provisions of Da-112 because: (1) the transactions did not constitute "purchases" within the meaning of the Act because "possession and control [and] . . . the right such as a buyer and owner under a sale and purchase contract normally has . . ." never effectively belonged to CCC, and (2) "[t]he basic theory of the 'purchase' method is removal from the market of goods which cannot be sold in the commercial market at CCC's

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6. United States v. Swift & Co., 152 F. Supp. 738 (D. Md. 1957), *aff'd*, 257 F.2d 787 (4th Cir.), *cert. denied*, 358 U.S. 837 (1958). United States v. H. J. Heinz Co., consolidated with the instant case, was originally filed in the District Court for the Eastern District of Pennsylvania, and was transferred to the Western District of Wisconsin pursuant to 28 U.S.C. § 1404(a) (App. 98); United States v. Kraft Foods Co., seeking repayment of $293,385.06, was originally filed in the District Court for the Eastern District of Pennsylvania but has since been dismissed by stipulation upon agreement between the parties that the decision in the instant case will be considered determinative. A declaratory judgment suit similar to the instant case has proceeded parallel to these cases, and was decided on the basis of the *Swift* decision: Land O'Lakes Creameries, Inc. v. Commodity Credit Corp., ____ F. Supp. ____ (D. Minn.), *aff'd*, 265 F.2d 163 (8th Cir. 1959). Petitioners are informed that the Department of Justice has also filed numerous other cases which are now pending in District Courts throughout the country awaiting final determination in this proceeding.

purchase price, and there was no such removal in these transactions." (164 F. Supp. at 182; App. 1012-3) The Court ruled that petitioners must return the money received under the Da-112 transactions with interest from May 8, 1956, the date repayment was demanded (164 F. Supp. at 183-84; App. 1012-3). Separate judgments were entered by the Court in favor of CCC against petitioners for sums which totaled $1,174,543.47 (App. 1046-52).

The Court of Appeals, while reversing and remanding insofar as ante-judgment interest was allowed, affirmed the judgments of the District Court in respect of the merits, holding that the word "purchases" should be given its "*normal*" meaning and not its "*legal*" meaning.

REASONS FOR GRANTING THE WRIT

1. This case presents a question that is basic in the administration of the Act and that is fundamental in the Government's price support program for dairy products, and should, therefore, receive the consideration of this Court.

The Secretary of Agriculture is charged with the responsibility of administering the Agricultural Act of 1949. In directing the support of milk and butterfat prices and in confining the means of accomplishing it to purchases of or loans on the *products* of milk and butterfat, Congress requires the Secretary to achieve support of dairy prices through transactions with members of the dairy products industry. Through no effort or desire on its own part, the dairy products industry has been placed in the position of being a vital and important instrument in accomplishing the price support program. But no matter how desirous they may be of cooperating with the Secretary, the members of the dairy industry can hardly be expected to run the risk of engaging in future transactions which appear

both to them and to the Secretary to be clearly authorized by the plain language of the applicable statute when such transactions may be set aside years later because the law under which they took place is given an interpretation that does not conform to generally recognized legal standards but, instead, is judged by a standard of "normalcy" which is undefinable and about which neither they nor the Secretary could have known.

The Department of Justice has attempted to create the impression that the transactions in dispute were novel, were a mistake with unfortunate results for petitioners, and that similar transactions will not occur again. The Da-112 transactions were novel only in that the same set of economic circumstances had not arisen before, so that the specific program initiated by the Department of Agriculture was, of course, without precedent on "all fours". However, the "purchase method" of price support was not only not novel but for years has been the basis for programs under which the petitioners and CCC have carried on transactions. This Court should recognize what both the Department of Agriculture and petitioners and other members of the dairy products industry know—there is no reason to believe that the same or similar circumstances that gave rise to Da-112 cannot or will not occur again.

Even the Court of Appeals recognized the importance of the issues in these cases and said (with specific reference to the *Swift* case):

> ". . . the case involved an important segment of the government price control program for agricultural products, pertaining to the economic life of the nation, and also a substantial monetary claim of CCC . . ." (266 F.2d at 263)

2. Petitioners are caught in a crossfire between two

departments of the Government. The Secretary and Department of Agriculture realize this and recognize the importance of the question presented. They know that the industry would not have abandoned its own plans and changed its position irrevocably if it had not, through its long course of dealing with CCC and the Department, acquired that confidence without which a change of position would not have been made.

The Court of Appeals errs in stating that "CCC insists" the Da-112 transactions were not "purchases", and that "CCC points out" arguments in support of that position. These contentions in the courts below were made by the Department of Justice appearing of record on behalf of CCC in court, while CCC and the Department of Agriculture have consistently asserted the legality of the Da-112 program and supplied three of the seven witnesses who testified at the trial in support of petitioners.

Petitioners have never contended that the Government is estopped by the actions of the Department of Agriculture, but petitioners do believe that their good faith reliance upon Da-112 which led them to abandon their plans to sell to CCC under its existing and unchallenged procedures establishes a set of circumstances which presents a serious issue of "elementary fairness" that should make for a thorough consideration of the legal question presented to this Court. *Cf. Moser v. United States*, 341 U.S. 41, 47 (1951).

In order to assist this Court in determining the importance of the legal issues presented, the petitioners in the *Swift* case (*supra* note 6, at 8) suggested in their Petition that the Solicitor General state the views of the Secretary of Agriculture (Petition in No. 270, October Term, 1958, p. 12). This suggestion was ignored by the Government

(See Reply Brief in Nos. 270 and 271, October Term, 1958, p. 3).

Since the present petitioners would expect a suggestion like that in the *Swift* Petition to receive the same treatment by the Government, and since the question presented on the merits is of major importance to the administration of price support legislation, petitioners respectfully suggest that this Court request the Solicitor General to submit a memorandum from the Department of Agriculture, setting forth its views on the matters raised by this Petition. *Cf.* Supplemental Memorandum for the United States, in *United States v. Radio Corporation of America*, No. 54, October Term, 1958.

3. The Court of Appeals did not afford petitioners the independent review to which they were entitled. In clear conflict with numerous decisions of this Court, the Court of Appeals attributed unwarranted significance to the *Swift* decision, *supra*, because this Court had denied certiorari to review that decision.

The Court of Appeals paid lip service to the settled maxim that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case". *United States v. Carver*, 260 U.S. 482, 490 (1923). It stated the proposition that such denial "simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court". *Agoston v. Pennsylvania*, 340 U.S. 844 (1950) (separate memorandum). But the court fell into error and demonstrated its failure to review independently the decision of the lower court when it continued as follows:

> ". . . our attention has been called to no language used by the Court impelling us to the conclusion that the members of the Court who did not vote for certiorari

> in the Swift case were indifferent to the opinion or the result in the Court of Appeals. . . . [T]he lack of at least four votes for granting certiorari cannot realistically be considered meaningless to federal courts who are asked to follow the Court of Appeals decision in Swift as a correct interpretation of the law. In view of the nature of the case, the fact that some justices (which could be as many as six or more) did not vote for certiorari is at least an indication that they either did not disapprove, or did not doubt, the correctness of the ruling below.
>
> "We hold . . . ." (266 F.2d at 263; App. B, *infra*, p. 43)

The court's view of the significance of the denial of certiorari is directly in conflict with statements by this Court and individual Justices.[7] Under the circumstances, petitioners have been denied the independent judgment of the Court of Appeals. That court went beyond mere reliance upon the decision of the Court of Appeals for the Fourth Circuit in the *Swift* case. Its entire approach to the merits of this

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7. Sheppard v. Ohio, 352 U.S. 910, 911 (1956) (separate memorandum); Rosenberg v. United States, 344 U.S. 889 (1952) (separate memorandum; "Misconception regarding the meaning of such a denial persists despite repeated attempts at explanation. It means, and all that it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari."); Agoston v. Pennsylvania, *supra;* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (separate opinion); Atlantic Coast Line R.R. v. Powe, 283 U.S. 401, 403 (1931); United States v. Carver, *supra;* Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916). *Cf.* Brown v. Allen, 344 U.S. 443, 492, 543 (1953) (concurring opinion; "I agree that, as *stare decisis*, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case."); Wade v. Mayo, 334 U.S. 672, 680 (1948); Sunal v. Large, 332 U.S. 174, 181 (1947); House v. Mayo, 324 U.S. 42, 48 (1945).

case was misguided because of the significance it attributed to the denial of certiorari in that case.

Defendants' presentation in the *Swift* case was fundamentally different from that of petitioners in the case at bar. There defendants apparently believed it unnecessary to prove and press upon the courts the fact that the Da-112 transactions were purchases in the plain legal sense, but were satisfied to rely upon the sufficiency of the fact that the transactions had the *economic effect* of "purchases." Throughout the trial and appeal of the case at bar, petitioners have attempted to obtain an answer to the only real question raised by the transactions under Da-112—whether the sale of dairy products to CCC under Da-112 constituted "purchases" by CCC, as authorized by Congress.

By following the unreviewed decision of the Fourth Circuit in the *Swift* case, the Court of Appeals for the Seventh Circuit viewed the question not as it emerged from the instant record, but as it was viewed by the other court. Petitioners are before this Court to obtain a review which will result in a definitive determination of the plain legal meaning of the word "purchases" as used in the Act and the CCC Charter Act.

4. The decision below was incorrect.

The Court of Appeals erred in rejecting the plain meaning of the word "purchases" under the law of sales in determining whether or not the Da-112 transactions between petitioners and CCC constituted purchases of dairy products by CCC within the meaning of the Act.

If the transactions were purchases, they were within the Secretary's statutory powers; if they were not purchases, they were unauthorized. The basic question on the merits is that simple.

(a) Unless it would lead to an absurd result or one plainly at variance with the purpose of the legislation as a whole, a court must give the words of a statute their plain meaning. *Union Pacific R.R. v. Hall*, 91 U.S. 343, 347 (1875); *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940). Where, as in the present instance, the words are legal terms, they must be given their legal significance. 82 C.J.S. *Statutes* § 330, p. 654.

(b) The challenged transactions should have been upheld as constituting "purchases" since they fulfilled every requirement of the law of sales, as stated in the Uniform Sales Act, which is declaratory of the common law: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." In Da-112 transactions there was agreement between petitioners and CCC that petitioners would transfer their property in identifiable dairy products to CCC at specified times and at specified prices (paragraphs 8, 9, App. 667-9). With respect to cheese, for instance, paragraph 9 of Da-112 provided that it had to "be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954," and that transfer of title would be effected "at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later"; paragraph 8 of Da-112 stated the prices that would be paid by CCC.

Under the law a sale is a contract whose terms are governed by the intention of the parties. When a sale contract unambiguously expresses an intention that title shall pass at a stated time, as the Da-112 contracts did, title vests at the stated instant in the buyer, and by the inexorable operation of the law there is a sale. *Briggs v. United States*, 143 U.S. 346, 354 (1892); *Commonwealth Title Ins. & Trust Co. v. Gregson*, 303 Ill. 458, 135 N.E. 745 (1922).

This result can be avoided in this case only by asserting that the stated intention was not genuine, was somehow a sham or a fiction contrived to hide the real intention. *Cf. United States v. Steiner*, 152 F.2d 484 (7th Cir. 1945). But such speculation is obviated by the stipulated fact that the parties to these contracts acted in good faith throughout (App. 1042-43; 192). And the entire record confirms that good faith.

The District Court evaded discussion of the law of sales. In its opinion no weight was given to the good faith intention of the parties to transfer title—and instead there was substituted for the time-tested instrument of the law an undefined concept of a "normal" sale. The Court of Appeals affirmed that approach. What is a "normal" sale? By what standards can normality be determined?

If sales law actually conformed to so naive a norm as the lower courts have applied in judging Da-112 transactions, it would long ago have thwarted the development of our complex economy in which repurchase options and contracts, instantaneous transferrals of title, binding contracts concerning future goods, conditions precedent and subsequent, conditional sales, sales with the privilege of return, and an infinite variety of "paper transactions" that transfer title are everyday affairs. A buyer does not have full rights of ownership unless he has the right to make contracts concerning what he owns, and the fact that he ties his own hands by entering into a re-sale contract does not derogate at all from the fact that he has and is exercising rights as a buyer and owner. *Cf. Collins v. Fleming*, 159 F.2d 426 (Emer. Ct. App. 1947); *Reed & Fibre Products Corp. v. Rosenthal*, 153 Md. 501, 138 Atl. 665, 669-70, 672 (1927).

Since the disputed transactions were "purchases," they were within the statutory powers of the Secretary of Agriculture. Any attack upon the nature of the transactions is an attack upon the Secretary's exercise of discretion which is not permissible under the Act.[8] This is the complete answer to every contention made by the Department of Justice with respect to the Da-112 transactions.

(c) If it was proper for the Court of Appeals to go beyond the plain legal meaning of the term "purchases" in construing the Act, which petitioners contend it was not, the court should have given controlling weight to the determination of the Secretary of Agriculture that the transactions under Da-112 were "purchases".

Both by law and by the terms of the Act itself, a presumption of validity attached to the Secretary's determination that the Da-112 transactions were "purchases" within the meaning of the Act. When the courts go beyond the plain legal meaning of a disputed statutory term, as the court did in this case, the weight that attaches to that presumption is particularly great.[9] Yet the Secretary's determination was given no weight whatsoever by the Court of Appeals.

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8. "Determinations made by the Secretary under this Act shall be final and conclusive . . . ." App. A, *infra*, p. 23.

9. App. A, *infra*, pp. 21, 23; Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153-4 (1946); Billings v. Truesdell, 321 U.S. 542, 552-3 (1944); Gray v. Powell, 314 U.S. 402, 412-3 (1941); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933); United States v. Jackson, 280 U.S. 183, 193 (1930); United States v. Alabama Great So. R.R., 142 U.S. 615, 621 (1892); United States v. Moore, 95 U.S. 760, 763 (1877).

5. In contending that the Secretary exceeded his authority, the Department of Justice has, among other things, argued that the Secretary made "payments" to petitioners which constituted a subsidy, that the commodities in question were not removed from the commercial market, that the transactions were akin to "wash sales", and that the contracts were not binding upon the petitioners. Such arguments have obscured the issue, and petitioners believe that they have no place in the case at bar because a decision that the Da-112 transactions constituted purchases would provide a complete answer to the only real issue. Nevertheless, anticipating that the same arguments may be made to this Court, petitioners wish to inform this Court briefly in respect of each such contention.

(a) By constantly referring to the funds received by petitioners as "payments" the Department of Justice has created the erroneous impression that they were payments in the economic sense, and not funds expended by the Secretary in the making of purchases to support prices. A subsidy is a payment directly to the producer of a supported product which augments his income but allows the market price to find its own level; a price support program embodying the "purchase method" removes the product from the commercial market and thereby directly affects market price. This removal requires no particular physical manifestation; it is effective if the commodities are not for sale in the commercial market. The uncontradicted evidence in the record shows that the commodities involved in the Da-112 transactions were taken out of regular business

channels and kept safely in place for CCC in the manner required by the contracts (App. 466, 530-1).

(b) The disputed transactions are readily distinguishable from the payment method known as "wash sale," discussed by the Department of Agriculture in a report to the House Committee on Agriculture in January 1953, a time when the Secretary had no reason to suspect that the Da-112 transactions would be held to be invalid (H.R. Doc. No. 57, 84th Cong., 1st Sess., 1955; App. 787). In a "wash sale," there is simultaneous purchase by CCC and sale back at a lower price, much the same as direct payments on production. In the instant transactions, the dairy products were removed from the commercial market from the date of the contracts through March 31, 1954, the end of the marketing year. This removal was intended to and did bolster the market price level, whereas wash sales or direct subsidy payments would not have accomplished a removal of cheese and butter from the commercial market and therefore could not have supported their prices.

(c) The Department of Justice has maintained that the provision in Da-112 that failure to hold the dairy products in place for CCC until at least the end of the marketing year would "render the contract void" (App. 669) was inserted in Da-112 as an "escape hatch" through which sellers could avoid their contractual obligations. Petitioners have clearly disproved this assumption; indeed, the CCC attorney who drafted the provision in question testified that it was inserted for the benefit of the CCC "to emphasize the importance of the requirement that the commodity had to be held at the place where [CCC] inspected it until the sale back was completed in April" (App. 372).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1959

APPENDIX A.

AGRICULTURAL ACT OF 1949.

The pertinent parts of the Agricultural Act of 1949 (63 Stat. 1052 (1949), 7 U.S.C. §§ 1421-50) are as follows:

Sec. 1421 (Sec. 401 of Act). *Source of Price Support; Authority of Secretary; Factors Considered; Compliance by Producer; Time of Determining Levels.*

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. . . .

• • • • • • •

Sec. 1426 (Sec. 406 of Act). *Advance Announcement of Price Support Levels; Variation of Levels.*

The Secretary shall, insofar as practicable, announce the level of price support for . . . agricultural commodities in advance of the beginning of the marketing year . . . the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

Sec. 1427 (Sec. 407 of Act). *Sale of Farm Commodities; Policies and Rates of Sale; Exceptions.*

The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. In determining sales policies for basic agricultural commodities or storable nonbasic com-

modities, the Corporation should give consideration to the establishing of such policies with respect to prices, terms, and conditions as it determines will not discourage or deter manufacturers, processors, and dealers from acquiring and carrying normal inventories of the commodity of the current crop. The Corporation shall not sell any basic agricultural commodity or storable non-basic commodity at less than 5 per centum above the current support price for such commodity, plus reasonable carrying charges. The foregoing restrictions shall not apply to (A) sales for new or by-product uses; (B) sales of peanuts and oilseeds for the extraction of oil; (C) sales for seed or feed if such sales will not substantially impair any price-support program; (D) sales of commodities which have substantially deteriorated in quality or as to which there is a danger of loss or waste through deterioration or spoilage; (E) sales for the purpose of establishing claims arising out of contract or against persons who have committed fraud, misrepresentation, or other wrongful acts with respect to the commodity; (F) sales for export; (G) sales of wool; and (H) sales for other than primary uses.

Sec. 1428 (Sec. 408 of Act). *Definitions.*

For the purposes of this Act—

(a) A commodity shall be considered storable upon determination by the Secretary that, in normal trade practice, it is stored for substantial periods of time and that it can be stored under the price-support program without excessive loss through deterioration or spoilage or without excessive cost for storage for such periods as will permit its disposition without substantial impairment of the effectiveness of the price-support program.

* * * * * *

(g) A "basic agricultural commodity" shall mean corn, cotton, peanuts, rice, tobacco, and wheat, respectively.

(b) A "nonbasic agricultural commodity" shall mean any agricultural commodity other than a basic agricultural commodity.

Sec. 1429 (Sec. 412 of Act). *Determinations of Secretary as Final and Conclusive.*

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

* * * * * * *

Sec. 1431 (Sec. 416 of Act). *Disposition of Food Commodities Subject to Deterioration or Spoilage.*

In order to prevent the waste of food commodities acquired through price support operations which are found to be in danger of loss through deterioration or spoilage before they can be disposed of in normal domestic channels without impairment of the price support program, the Secretary of Agriculture and the Commodity Credit Corporation are authorized [to donate the commodities to certain public and private charities]. . . .

Sec. 1446 (Sec. 201 of Act). *Price Support Levels for Designated Nonbasic Agricultural Commodities.*

The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447-1449 of this title) price support to producers for wool (including mohair), tung nuts, honey, Irish potatoes, *milk, butterfat, and the products of milk and butterfat* as follows:

(a) The price of wool (including mohair) shall be supported through loans, purchases, or other operations at such level, not in excess of 90 per centum nor less than 60

per centum of the parity price therefor, as the Secretary determines necessary in order to encourage an annual production of approximately three hundred sixty million pounds of shorn wool;

(b) The price of tung nuts, honey, and early, intermediate, and late Irish potatoes, respectively, shall be supported through loans, purchases, or other operations at a level not in excess of 90 per centum nor less than 60 per centum of the parity price therefor;

(c) *The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefore as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat.* (Italics supplied.)

COMMODITY CREDIT CORPORATION CHARTER ACT

The pertinent parts of the CCC Charter Act (62 Stat. 1070 (1948), 15 U.S.C. §§ 714-714o) are as follows:

Sec. 714 (Sec. 2 of Act). *Creation and Purpose of Corporation.*

For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibres (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as

the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general direction and control of its Board of Directors.

* * * * * * *

Sec. 714b (Sec. 4 of Act). *General Powers of Corporation.*

The Corporation—

* * * * * * *

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. . . .

(j) Shall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid.

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

(l) May make such loans and advances of its funds as are necessary in the conduct of its business.

* * * * * * *

Sec. 714c (Sec. 5 of Act). *Specific Powers of Corporation.*

In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act, the Corporation is authorized to use its general powers only to—

(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations.

(b) Make available materials and facilities required in connection with the production and marketing of agricultural commodities.

(c) Procure agricultural commodities for sale to other Government agencies, foreign governments, and domestic, foreign, or international relief or rehabilitation agencies, and to meet domestic requirements.

(d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities.

(e) Increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.

(f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities.

* * * * * * *

Sec. 714g (Sec. 9 of Act). *Board of Directors; Composition; Appointment, Tenure, and Compensation; Interim Board.*

The management of the Corporation shall be vested in a Board of Directors (hereinafter referred to as the "Board"). The Board shall consist of five members. The Secretary of Agriculture, or his nominee, shall be a member of the Board and the remaining members shall be appointed by the President by and with the advice and consent of the Senate. . . :

* * * * * * *

Sec. 714h (Sec. 10 of Act). *Executive Staff; Composition; Duties; Appointments.*

Responsibility for the day-to-day conduct of the business of the Corporation shall be vested in a staff of executive officers headed by a chief executive appointed by the Board and responsible to the Board. Members of the executive

staff shall devote their full time to the affairs of the Corporation. The Board shall define the authority and duties of the members of the executive staff, delegate to them such of the powers vested in the Corporation as it may determine, require that such of them as it may designate be bonded and fix the penalties therefor. . . .

* * * * * * *

Sec. 714k (Sec. 13 of Act). *Records; Annual Report.*

The Corporation shall at all times maintain complete and accurate books of account and shall file annually with the Secretary of Agriculture a complete report as to the business of the Corporation.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 12481-12486

KRAFT FOODS COMPANY OF WISCONSIN,
a Wisconsin corporation, et al.,
Plaintiffs-Appellants,

v.

COMMODITY CREDIT CORPORATION,
Defendant-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

April 29, 1959

Before SCHNACKENBERG, PARKINSON and KNOCH, Circuit Judges.

John T. Chadwell, Richard M. Keck, Rudy L. Ruggles, Jean Engstrom, Chicago, Ill., Glenn W. Stephens, Madison, Wis., for Kraft Foods Company of Wisconsin.

Stuart S. Ball, Richard J. Flynn, Chicago, Ill., Joseph A. Greaves, Chicago, Ill., R. M. Stroud, Madison, Wis., for The Borden Company.

W. Wade Boardman, Walter M. Bjork, Madison, Wis., Edward A. Mullery, Omaha, Neb., for The Cudahy Packing Company.

George E. Leonard, Jr., Louis R. Miller, Chicago, Ill., R. M. Stroud, Madison, Wis., for Armour and Co., and the Berst Corp.

Richard J. Faletti, Chicago, Ill., Glenn W. Stephens, Madison, Wis., for Safeway Stores, Inc.

W. Wade Boardman, Walter M. Bjork, Madison, Wis., for H. J. Heinz Co.

Claude A. Roth, Harry E. Smoot, Chicago, Ill., Glenn W. Stephens, Madison, Wis., for L. D. Schreiber & Co., Inc.

Marvin C. Taylor, Civil Division, Dept. of Justice, Washington, D. C., George E. Rapp, U. S. Atty., Madison, Wis., Robert Tieken, U. S. Atty., Chicago, Ill. (George Cochran Doub, Asst. Atty. Gen., on the brief), for appellee.

SCHNACKENBERG, Circuit Judge.

In appeal No. 12481; Kraft Foods Company of Wisconsin, a Wisconsin corporation, and The Borden Company, a New Jersey corporation, in appeal No. 12482, The Cudahy Packing Corporation, a Maine corporation, in appeal No. 12483, Armour and Company, an Illinois corporation and The Berst Corporation, an Illinois corporation, in appeal No. 12484, Safeway Stores, Incorporated, a Maryland corporation, in appeal No. 12485, H. J. Heinz Company, a Pennsylvania corporation, and in appeal No. 12486, L. D. Schreiber & Co., a Delaware corporation, ask this court to reverse judgments of the district court, dismissing complaints for declaratory relief filed by said corporations[1] against Commodity Credit Corporation, defendant, herein

1. These actions were consolidated for trial.

referred to as "CCC", and awarding monetary recovery against each of said plaintiffs on defendant's counterclaims.[2]

By their actions, plaintiffs sought a declaratory judgment that they were not obligated to repay to CCC certain sums of money paid to them by CCC pursuant to contract entered into in the spring of 1954, and that the Department of Agriculture, herein referred to as "Agriculture", had authority, in connection with its support of prices of dairy products, to establish in the spring of 1954 a "purchase and resale program", and to make, through CCC, the payments thereunder which were thereafter demanded back by the Department of Justice relying on the authority of United States v. Wurts, 303 U.S. 414, 58 S.Ct. 637, 82 L. Ed. 932.

On August 15, 1955, the Comptroller General of the United States published his opinion that the applicable statute, 7 U.S.C.A. § 1421 et seq., did not authorize the disbursements. On May 8, 1956 the Department of Justice demanded return, for the account of CCC, of the disbursements made to plaintiffs.

Answers to plaintiffs' complaints in the suits at bar were filed in the name of CCC, alleging lack of authority to make the disbursements; and also counterclaims seeking their recapture with interest and costs.[3]

The court below held that the purchase and resale program and the disbursements thereunder were not authorized by the basic statute, and ordered their repayment

2. These appeals were consolidated for hearing in this court.

3. Plaintiffs contend that the Secretary of Agriculture and the officials of CCC and Agriculture have, however, steadfastly maintained that the contracts were valid.

Counsel for the U. S. Department of Justice have appeared herein for CCC, contending that the contracts were unauthorized

together with interest from the date when the Department of Justice demanded their return. 164 F.Supp. 168.

The judgments below were for the *net* amount of the monies received by plaintiffs ($1,062,092.27), and interest.

Certain sections of the Commodity Credit Corporation Charter Act, 15 U.S.C.A. § 714 et seq., provided for the creation and purpose of CCC. Among the powers conferred specifically are those in § 714c, as follows:

* * * * *

"* * * the Corporation is authorized to use its general powers only to—

"(a) Support the prices of agricultural comodities through loans, purchases, payments, and other operations. * * *".

Pertinent parts of the Agricultural Act of 1949, 7 U.S.C.A. § 1421 et seq., we now set forth:

§ 1421 provides:

"(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

"(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *"

1426 provides:

"The Secretary shall, insofar as practicable, announce the level of price support for * * * agricultural commodities in advance of the beginning of the marketing year * * * the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced."

§ 1427 provides:

"The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. In determining sales policies for basic agricultural commodities or storable nonbasic commodities, the Corporation should give consideration to the establishing of such policies with respect to prices, terms, and conditions as it determines will not discourage or deter manufacturers, processors, and dealers from acquiring and carrying normal inventories of the commodity of the current crop. The Corporation shall not sell any basic agricultural commodity or storable nonbasic commodity at less than 5 per centum above the current support price for such commodity, plus reasonable carrying charges. * * *"

§ 1428 provides:

"*Definitions*

"For the purposes of this Act—

"(a) A commodity shall be considered storable upon determination by the Secretary that, in normal trade practice, it is stored for substantial periods of time and that it can be stored under the price-support program without excessive loss through deterioration or spoilage or without excessive cost for storage for such periods as will permit its disposition without substantial impairment of the effectiveness of the price-support program.

* * * * *

"(c) A 'basic agricultural commodity' shall mean corn, cotton, peanuts, rice, tobacco, and wheat, respectively.

"(d) A 'nonbasic agricultural commodity' shall mean any agricultural commodity other than a basic agricultural commodity."

§ 1429 of the Act provides:

"Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act."

§ 1446, reads as follows:

"*Price support levels for designated nonbasic agricultural commodities*

"The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447-1449 of this title) price support to producers for wool (including mohair), tung nuts, honey, Irish potatoes, milk, butterfat, and the products of milk and butterfat as follows:

"(a) The price of wool (including mohair) shall be supported through loans, purchases or other operations at such level, not in excess of 90 per centum nor less than 60 per centum of the parity price therefor, as the Secretary determines necessary in order to encourage an annual production of approximately three hundred sixty million pounds of shorn wool;

"(b) The price of tung nuts, honey, and early, intermediate, and late Irish potatoes, respectively, shall be supported through loans, purchases, or other operations at a level not in excess of 90 per centum nor less than 60 per centum of the parity price therefor;

"(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat. Oct. 31, 1949, c. 792, Title II, § 201, 63 Stat. 1052."

1. Of course, it is not for us to determine whether the statutory plan of price supports set up by congress is wise. There being no contention that congress exceeded its constitutional powers in the legislation enacting this plan, the wisdom thereof is exclusively a legislative matter.

Nor have we any right to question the acts of the designated agencies in administering the Act, in the absence of charges of fraud or bad faith, if the agencies acted within the framework of the Act and did not abuse their discretion.

CCC asserts that support was never accorded through loans and says that the issue is whether the transactions under a special program established by Agriculture, known as announcement Da-112, were "purchases" within the meaning of that word as used in the Act.

CCC reasons in its brief:

> "The *theory* of the purchase method is that manufacturers and handlers of cheese, butter and milk powders can afford to pay and therefore will pay farmers the desired 'support prices' for their milk and butterfat because the investment in cheese, butter and milk powders can always be recovered through sales to CCC if the open market will not absorb the goods at that price. * * * CCC's purchases have been limited to the products named above because the perishability of the raw materials made their purchase by CCC impractical, and because of the belief that support through purchases of the designated products would tend to support prices for milk for all uses. * * *
>
> "Agriculture did not check up on whether persons offering products to CCC did in fact pay 'support prices' to farmers for the milk and butterfat used in making the products offered to it; nor insist that such 'support prices' be paid as a condition of offerings to CCC. * * *

> "This is what is called the 'purchase method' of support, as distinguished from the 'payment method.' * * * The Secretary of Agriculture * * * and the Solicitor of Agriculture * * * and the Attorney General * * * have ruled that price support of dairy products under the 1949 statute is limited to the purchase method, and that support through 'payments' or 'other operations'—both of which have been used at one time or another in connection with support of some other agricultural products—is not permissible in supporting dairy products."

The record shows that, under date of February 18, 1954, Agriculture announced support prices for manufacturing milk and butterfat, the prices being based on 75% of parity support level, compared with 90% for the 1953-54 marketing year. The announcement stated that, in carrying out this support program, defendant would offer to purchase butter, cheddar cheese, and nonfat dry milk solids in carlot quantity during the period April 1, 1954 through March 31, 1955, and the support prices for manufacturing milk and butterfat for the 1954-55 marketing year reflect 75% of the parity equivalent for manufacturing milk and the parity price for butterfat.[4] Defendant also announced that it would buy through March 31, 1954 at specified prices certain grades of butter, cheddar cheese and nonfat dry milk solids. On March 9, 1954 Agriculture's announcement Da-112 stated that, for the remainder of March, it was prepared, through defendant, to purchase certain butter, cheese and milk.

> "* * * under the present program to support prices of manufacturing milk to producers and to resell these commodities to their offerers at CCC domestic sales

4. The support price for manufacturing milk for 1954-55 marketing year was based on 88.5 percent of the parity price for all milk.

prices in effect during April. For this purpose certain requirements of the present price support purchase programs for these commodities are being changed.

"Purchases made under this Announcement Da-112 will be limited to commodities which the offerer agrees to repurchase from CCC as hereinafter provided. * * *

* * * * *

"How To Submit An Offer.

"Offers may be submitted so as to be received daily through close of business March 31, 1954, by letter or telegram to the CSS Commodity Office serving the area in which the product is located * * *. Offers received each day, if in accordance with the terms of this announcement, will be subject to acceptance by the CCC by telegram * * *.

* * * * *

"* * * All offers must state the following:

* * * * *

"h. An offer to repurchase the commodity from CCC on April 1 or on the date the commodity is delivered to CCC, whichever is later, at the CCC domestic sales price for the commodity concerned in effect on April 1 or on the date of delivery to CCC, whichever is later."

Da-112 also stated that "upon acceptance by the CCC the offer and acceptance shall constitute a valid and binding contract." It also provided for an opportunity for Agriculture to inspect samples of the commodity located in storage suitable to defendant.

In paragraph 8 the prices to be paid by defendant for commodities offered were listed.

Paragraph 9, Delivery, provided that cheese was to be owned or under consignment to offerer not later than March 31, 1954, and delivery thereof and transfer of title

thereto to be effected at the time it was graded or when offer was accepted, whichever was later. All commodities were subject to quality requirements.

In addition, Da-112, in paragraphs 9 and 10, provided that the

> "* * * offerer, at his expense, shall hold for CCC at the location at which it is graded * * * and delivered, the commodity which he has delivered to CCC from the time of delivery until CCC redelivers the commodity to the offerer. Failure of the offerer to hold the commodity for CCC until its redelivery to the offerer shall render the contract void.
>
> "* * * The offerer by submitting an offer to repurchase * * * agrees that * * * on April 1 or on the date on which delivery to CCC is effected, whichever is later, for cheese * * * to repurchase the commodity sold by offerer to CCC under terms of this contract at the CCC domestic sales price effective on such date of repurchase regardless of the quality or condition of the commodity, it being agreed for the purpose of this offer to repurchase that the commodity will on the date of such repurchase be of the same grade and quality as when sold by offerer to CCC.
>
> "Provided, however:
>
> "That if the CCC domestic sales price in effect on the date of redelivery to the offerer is greater than the March 31 CCC price support purchase price for the commodity concerned CCC will, at the offerer's request amend his contract to relieve him of liability to repurchase the commodity and to provide for its sale to CCC under the terms of Announcements Da-99, 100, 101, and 102, as amended.
>
> "Provided, further:
>
> "That if the CCC domestic sales price in effect on the date of redelivery to the offerer is greater than the

March 31 CCC price support purchase price for the commodity concerned, CCC will, at the offerer's request, render his contract void."

Paragraph 11 provided:

"• • • Delivery by CCC to offerer shall be effected on April 1 or on the date on which the commodity is delivered to CCC, whichever is later. Delivery of the commodity to CCC in accordance with the paragraph entitled 'DELIVERY' above shall effect redelivery by CCC to the offerer on April 1 or on the date CCC takes delivery, whichever is later."

Paragraphs 12, 13 and 14 provided:

"Commodities offered for sale under the terms of this announcement shall remain in the place and in the form in which they are sampled or graded from the time of the sampling or grading until they are delivered to CCC and finally until title revests in the offerer.

"Commodities sold to CCC under the terms of this announcement for resale to the offerer shall be stored by the offerer in such a manner as will protect them from deterioration and shall be handled in accordance with good commercial practice. Any storage, handling or transportation charges connected with the sale of the commodities to CCC or with their resale to the offerer or with their care and protection during the term of a contract under this announcement shall be for the account of the offerer. The offerer by submitting an offer agrees to act as insurer to CCC of the commodities and their quality while title to commodity is in CCC and offerer shall assume all risk of loss.

"Settlement for commodities purchased and resold under the terms of this announcement shall be made after redelivery to offerer on the basis of vouchers or certified invoices submitted by the offerer in each case claiming the net difference between the sales price to

CCC and the sales price from CCC to offerer. Vouchers or invoices shall contain the statement 'The commodity remained in the place in which it was sampled or graded from the time of sampling or grading until repurchase and redelivered to the offerer,' and shall be supported by USDA grading and inspection certificates. Settlement will be made on the basis of the nearest even net pound."

Plaintiffs seek a reversal of the judgment below "because the challenged transactions clearly constituted purchases authorized by the Agricultural Act of 1949." On the other hand, CCC insists that these transactions under Da-112 were not "purchases" within the meaning of that word in § 1446(c) of the Act.

It is we think significant that § 1446 authorizes the Secretary to support the price of wool and the price of tung nuts, honey, and Irish potatoes, through loans, purchases, *or other operations*, but states that the price support of whole milk, butterfat, and the products of such commodities, shall be provided through loans on, or purchases of, the products of milk and butterfat. The omission of the words "other operations" when dealing with the products of milk and butterfat is conspicuous and must be given effect. It is not contended that the transactions involved in this case were loans. Hence, it follows, that whether or not they were authorized by the Act depends on whether they were purchases. If they were not purchases then they were not within the framework of the Act and the payments made by CCC for plaintiffs' products were unauthorized.

Plaintiffs reason that whether the term "purchases" is given its legal meaning or whether it is construed in the light of the whole legislative purpose, the conclusion must be the same, while CCC says that the word is to be given

its "normal meaning", and recedes somewhat from that position in saying that the word is "well-known in case and under the Uniform Sales Act."

Inasmuch as both parties refer to the normal meaning of the word, we will adopt that meaning rather than choose among the varying meanings to be found in case law and the provisions of the Uniform Sales Act (which is not in effect in all parts of the United States). Webster's New International Dictionary defines "purchase" as follows: "the acquisition of title to, or property in, anything for a price." The word as thus defined fits into the price support plan established by the Act and the word should be interpreted with the context of the Act in such a way as to accomplish the evident purpose of congress.

Contending that these transactions were not purchases by it, CCC points out (a) that the plaintiffs' combination offer to sell and to rebuy was not absolute and final, but only conditional,[5] (b) that acceptance of offers did not effect sales, but merely contracts to sell from which the offerer could be relieved if he changed his mind;[6] (c) that the cheese did not have to be in existence at the time of the offer and acceptance, its being in existence by March 31, 1954 being sufficient, even though the offer and acceptance

5. Paragraph 10 of Da-112 provided that, if the CCC domestic sales price for cheese or for butter effective on April 1, 1954 should be higher than CCC's 1953-54 purchase price, the offerer had an option to amend the arrangement into a contract to sell to CCC free from any obligation to rebuy or to declare it wholly void. Since the occasion for exercising the offerer's option would not occur until April 1, 1954, it follows that the offers were conditional until then, and that no property in the goods could have passed from the offerer before that date.

6. Da-112 provided that retention of the goods by the offerer until April 1, 1954 or the date of inspection (whichever was later) was a condition of his right to payment; and that his failure to retain the goods for this period "shall render the contract void

had occurred earlier,[7] (d) all goods had to pass Agriculture's inspection as to grade, according to paragraphs 4, 5 and 9 of Da-112, (e) under paragraph 13 of Da-112, the risk of loss was placed on the offerer, (f) physical delivery never occurred, nor was it intended, the owners continuing to treat the goods as part of their inventories, (g) CCC was not free to sell or give away or otherwise deal as an owner with goods it had "purchased," (h) it was committed to their alleged "resale" to the offerer, (i) the transactions under Da-112 did not effect removal of the goods from the market, such removal through final and unqualified sales of dairy products to CCC being the essence of the "purchase method" of support.[8]

With commendable forthrightness plaintiffs in their main brief call our attention to Swift & Co. v. United States, 8 Cir., 257 F.2d 787, certiorari denied, 358 U.S. 837, 79 S.Ct. 60, 3 L.Ed.2d 73, rehearing denied, 358 U.S. 901, 79 S.Ct. 220, 3 L.Ed.2d 152, which is in accord with the main result reached in the district court in this case. They seek to distinguish the Swift case on the ground that the defendants there

> "* * * took the position that the word 'purchases,' the key to all legal issues in the case, could, as used in the Act, only be interpreted broadly to include all transactions that served the economic objectives of the Act. The plaintiffs herein, on the other hand, have always conceded, indeed, as pointed out in the preceding sections, they have argued for, the more restricted interpretation—that 'purchase' meant a legal sale. A consequence of the position that Swift took was that the question of whether or not Da-112 transactions consti-

7. Pars. 5, 9 of Da-112.

8. We do not base our decision on the foregoing contention inasmuch as considerable doubt is cast upon its validity by the provisions of § 1427 of the Act, supra.

> tuted legal sales was never adequately presented or argued to the trial court or to the Court of Appeals in the Swift proceedings."

They reiterate that the Da-112 transactions constituted "*legal* sales".

We do not believe that plaintiffs have thus actually distinguished the Swift decision from this case in the posture in which we view it. We would not be justified in ignoring Swift as a precedent merely because plaintiffs find that the court in that case was not asked to apply the *legal* meaning of the word "purchase". We reject that restricted interpretation of that word. As stated, supra, we are in accord with the normal meaning.

We approve of the following language used by the court in the Swift case, 257 F.2d at page 794:

> "* * * The so-called sales of cheese and butter by the processors were not purchases by CCC in any normal sense of the word. The products never left the possession of the processors or came into the hands of the United States and were never intended to do so. In short, the products never moved and there was no delivery or intention to deliver. Storage, handling and transportation charges connected with the sale or resale were 'for the account of the offerer' (processor) and the offerer assumed all risk of loss. The Government through CCC obtained no right to sell the goods to other parties but was obliged to resell them at a loss to the processor. On the other hand, the processor not only retained physical possession of the products but full power to disregard his contract to sell and repurchase and to dispose of or sell them to anyone he pleased without incurring any liability to the Government. CCC did not pay for the products which it purported to buy and the processors did not pay for the products which they purported to buyback. Both transactions were settled by one check of the CCC for the

loss incurred in the transaction, which it agreed in advance to assume."

While the United States Supreme Court never granted review of the decision of the Court of Appeals, in the Swift case, we are not unmindful of the fact that on two occasions it refused to do so. Although the denial of a writ of certiorari embodies no expression of opinion upon the merits of the case, United States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 67 L.Ed. 361; House v. Mayo, 324 U.S. 42, 48, 65 S.Ct. 517, 89 L.Ed. 739; Sunal v. Large, 332 U.S. 174, 181, 67 S.Ct. 1588, 91 L.Ed. 1982, and simply means that as a matter of "sound judicial discretion" fewer than four members of the court deemed it desirable to review a decision of a lower court, Agoston v. Commonwealth of Pennsylvania, 340 U.S. 844, 71 S.Ct. 9, 95 L.Ed. 619, our attention has been called to no language used by the Court impelling us to the conclusion that the members of the Court who did not vote for certiorari in the Swift case were indifferent to the opinion or the result in the Court of Appeals. Considering that the case involved an important segment of the government price control program for agricultural products, pertaining to the economic life of the nation, and also a substantial monetary claim of CCC, the lack of at least four votes for granting certiorari cannot realistically be considered meaningless to federal courts who are asked to follow the Court of Appeals decision in Swift as a correct interpretation of the law. In view of the nature of the case, the fact that some justices (which could be as many as six or more) did not vote for certiorari is at least an indication that they either did not disapprove, or did not doubt, the correctness of the ruling below.

We hold that in the transactions in question CCC did not at any time acquire title to, or property in, the

cheese offered by the plaintiffs, and that, therefore, there was no purchase in the normal meaning of that word. For that reason the payments made by CCC were not authorized by the Act, and CCC was entitled to recover them from plaintiffs. The district court did not err in entering judgment therefor. To the same effect is Land O'Lakes Creameries, Inc. v. Commodity Credit Corporation, 8 Cir., 265 F.2d 163.

2. In its counterclaim CCC prays for interest against plaintiffs on the sums of payments made to them in connection with the alleged purchases of cheese. The district court allowed interest against plaintiffs from the date of demands for repayment to the date of entry of judgments. In this court plaintiffs seek a reversal of the allowance of interest against them.

CCC in its brief relies on Wisconsin Central R. Co. v. United States, 164 U.S. 190, 17 S.Ct. 45, 41 L.Ed. 399, which, in our opinion, establishes that an action such as involved in the counterclaims herein is for money had and received. The court, 164 U.S. at page 212, 17 S.Ct. at page 52, said: "We concur in these views, and are of the opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono*[9] to refund them." Therefore, CCC is asserting actions in quasi contract. A quasi contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatever it is certain that a man ought to do, that the law supposes him to have promised

9. Black's Law Dictionary, p. 659: "A phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience. 3 Bl.Comm. 163."

to do. 17 C.J.S. Contract § 6, p. 324. In this case, the district court found[10] that all parties acted in good faith. The record reveals, moreover, that the plan embodied in Da-112 was the product of the government agencies involved and not of plaintiffs. The latters' able counsel make a strong, although unsuccessful, argument that these transactions were in conformity with the literal technical provisions of the Act. All of these circumstances convince us that we must refuse on equitable grounds to approve the charging of interest against plaintiffs up to the date of the judgments below. To the same effect, see Swift & Co. v. United States, supra, 257 F.2d 796; Land O'Lakes Creameries, Inc. v. Commodity Credit Corporation, supra. In allowing said interest, the district court abused its discretion.

For the foregoing reasons, the judgments from which these appeals have been taken are reversed insofar as ante-judgment interest was allowed against plaintiffs, and said cases, to that extent only, are remanded to the district court with instructions to enter suitable remittiturs, and in all other respects said judgments are affirmed.

In part affirmed, and in part reversed and remanded.

10. 164 F.Supp. 168, 183.

JUDGMENT

Filed and Entered April 29, 1959.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge
Hon. Win G. Knoch, Circuit Judge

No. 12481 to 12486

KRAFT FOODS COMPANY OF WISCONSIN, et al.,
Plaintiffs-Appellants,

v.

COMMODITY CREDIT CORPORATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court entered therein on June 20, 1958, in this cause appealed from be, and the same are hereby, REVERSED insofar as ante-judgment interest was allowed against Plaintiffs, and said appeals, to that extent only, are hereby REMANDED

to the Said District Court with instructions to enter suitable remittiturs, and in all other respects said judgments of the District Court be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 247

KRAFT FOODS COMPANY OF WISCONSIN, ET AL., PETITIONERS

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin (App. 985-1013)[1] is reported at 164 F. Supp. 168. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 28-45) is reported at 266 F. 2d 254.

[1] "App." refers to Petitioners' Appendix in the court below.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1959 (Pet. 46-47). The petition for certiorari was filed on July 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under the Agricultural Act of 1949, the Secretary of Agriculture's power to support the prices of whole milk, butterfat, and their products is limited to making "loans on, or purchases of" such commodities. On March 9, 1954, the Secretary announced that the level of support would be reduced on April 1 from 90% to 75% of parity, and he authorized the Commodity Credit Corporation to accept combination offers of manufacturers and handlers to "sell" butter and cheese to Commodity at one price and "rebuy" them from Commodity at a lower price, resulting, in each case, in a direct payment by the Government to the offerers of the difference between the two prices.

The question is whether these transactions exceeded the Secretary's power under the statute to support prices by "purchases."

STATUTE INVOLVED

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*, are set forth in the Appendix, *infra*, pp. 15-16.

STATEMENT

1. *The Statutory Background*

For an understanding of the transactions involved, a brief statement of the statutory background is desirable.

Government price supports on agricultural commodities began prior to World War II. Various methods of price support as to different commodities have been authorized by Congress and employed by the Department of Agriculture under different statutes. Thus, under the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, 7 U.S.C. 1281, *et seq.*), the Secretary of Agriculture was authorized "to make *payments* to producers * * * [of basic crops]" (7 U.S.C. 1303, emphasis added) and "to make available *loans* on agricultural commodities (including dairy products)" (7 U.S.C. 1302 (1946 ed.), emphasis added). The so-called Steagall Amendment to that statute (which was passed in 1941, 55 Stat. 498) broadened the authority of the Secretary by permitting the use of a "commodity loan, purchase, *or other operation*" if necessary to encourage production during the war emergency (15 U.S.C. 713a-8, emphasis added).

By a later war measure (Executive Order 9250, dated October 3, 1942, 7 F. R. 7871), the Secretary was authorized to hold the line on OPA ceiling prices, and at the same time uphold necessary farm production, through a program of purchases-and-resales-at-a-loss, whereby manufactured dairy products were bought at one price and immediately resold

to the vendor at a lower price without any physical delivery. The vendors were required to pass on the payments to the dairy farmers whom the program was designed to aid.[2] Toward the end of the war, however, Congress restricted and eventually abolished the authority of Commodity to make direct subsidy payments or to engage in "purchase-and-resale-at-a-loss" programs.

After the war ended, price supports for dairy products were once again found to be needed. Extensive congressional debates led to the passage of the Agricultural Act of 1948 (62 Stat. 1247). Under Title I of that statute, price support for the calendar year 1949 could be furnished by "loans, purchases, or other operations," and under Title II, support after January 1, 1950, could be effected by "loans, purchases, payments, and other operations." These statutory provisions authorized the use after January 1, 1950, of two methods of supporting agricultural prices: (1) the "purchase" method, under which excess supplies which will not move into consumption at the support level are removed from the market by government purchases; and (2) the "payment" or "subsidy" method, under which the prices of agricultural commodities are allowed to reach their free competitive level, and prices to producers are supported by payments (either direct or through manufacturers and dealers) based on the differential

[2] Price supports through direct purchases of whole milk and butterfat cannot be used because of the perishable nature of those commodities.

between the average market prices and prices at the desired support levels (App. 848).

The 1948 statute was not allowed to remain in effect. Strong opposition to the payment method of support developed, notwithstanding the fact that it was strenuously advocated by then Secretary of Agriculture Brannan. This opposition resulted in the passage of the Agricultural Act of 1949 (Appendix, *infra*, pp. 15-16). The omission of the payment method from this statute resulted from congressional insistence that supports be limited to government loans or purchases in the market (App. 847-851). Thus, although the Secretary was given a broad discretion as to the details of price support programs (7 U.S.C. 1421(b), 1429), the 1949 Act, which is the Act involved here, specifically limited and prescribed the permissible methods and levels of such supports. The statute provides that prices of dairy products shall be supported at such levels between 90% and 75% of parity "as the Secretary determines necessary in order to assure an adequate supply" and that "Such price support shall be provided through *loans* on, or *purchases* of, the products of milk and butterfat" (7 U.S.C. 1446(c), emphasis added).

The normal program, which has been uniformly followed since 1949 except for the special plan here involved, may be summarized as follows (App. 990-991, 1008-1009): The Secretary determines the parity level believed necessary to assure an adequate supply, translates the parity level into dollars-and-cents support prices for milk and butterfat, deter-

mines and announces the government purchase prices for the products of these commodities (computed on the basis of the support prices for the raw materials plus manufacturing costs), and stands ready to buy throughout the marketing year all products offered to Commodity at the support level which the commercial market cannot absorb. The goods would be delivered to Commodity shortly after its acceptance of the offer to sell. The offerer, however, might not be paid for several weeks to permit checking, auditing, and clearance of the transaction.

2. The Transactions Involved

For the marketing year ending March 31, 1954,[3] manufactured dairy products were supported by government purchases at the maximum level of 90% of parity. For example, cheese was purchased at 37¢ per pound and offered for sale at 39¢ (App. 856). Huge surpluses in government warehouses resulted and, because of this fact, Secretary of Agriculture Benson concluded that an adequate supply would be assured for the coming year with support at the minimum level of 75% of parity. Accordingly, he announced such a reduction in February 1954. As a result, cheese would be purchased at 32¼¢ per pound instead of the previous 37¢ (App. 856-857). This announcement resulted in a reduction of inventories by manufacturers and handlers, with in-

[3] The marketing year for milk and butterfat is April 1-March 31 (App. 1022).

creasingly large amounts being sold to Commodity to guard against inventory losses. A substantial amount of production was converted to large size cheddars, which were the only styles acceptable for government storage. The prices of milk and butterfat paid to dairy farmers, which had begun to fall in December and January, continued to decline through the remainder of the marketing year (App. 993).

The Department of Agriculture, fearing that the price of milk would continue to fall to undesirable levels, also feared that certain concerns would sell to Commodity such large parts of their regular inventories that a disruption of normal market conditions would occur, even though this might injure the good will of those concerns.

Faced with these unusual circumstances, the Department modified its normal program in several ways. Although Commodity usually did not announce the price at which it would *sell* products to the market until the beginning of each month, Secretary Benson announced on March 4 that the April sales price would be 2¢ above the announced 1954-55 purchase price for cheese, and 3¢ for butter, so that after April 1 cheese could be purchased from Commodity at 34¼¢ per pound (App. 994). This decision was supplemented by the issuance of Announcement Da-112, providing (as amended) for three major changes:

(a) To permit offers to sell to Commodity to be made during the closing weeks of March prior to inspection and grading (App. 1008). Since cheese

cannot be graded until at least ten days after production, cheese made during the last ten days of March normally is valued on the basis of the support level of the next marketing year.[4] Relaxation of the normal requirement that cheese be inspected before offer was designed to enable manufacturers to take advantage of the higher March support price of 37¢ per pound, and thereby continue to pay higher prices to dairy farmers during those weeks.

(b) To include "small sizes" of cheese in the price-support program for the first time. The declared purpose of the change was to afford manufacturers of such products the same inventory protection as Da-112 afforded to other manufacturers (App. 1010-1011).

(c) To establish, for the March 9—March 31 period, the program which is in issue in these cases (App. 662-671). Under Da-112, manufacturers were permitted, during the remainder of March, to submit combination offers to "sell" to CCC at the 1953-54 purchase prices (*e.g.*, 37¢ per pound for cheese) and "rebuy" the identical goods at the lower 1954-55 sales prices (*e.g.*, 34¼¢ for cheese) which would go into effect on April 1. All such offers had to be accepted before March 31. The time of "delivery" and "transfer of title" to Commodity was to be the date of Commodity's acceptance of the offer if the goods had been inspected before the offer, or the date of inspection (which could be at any time up until April 30), whichever was later. The "resale"

[4] See note 3, *supra*.

to the vendor was to take place on April 1 or on the date of "delivery" to Commodity, whichever was later. Therefore, as to that cheese which was inspected after April 1 (over 50% of the total, App. 1009), "purchase" and "resale" took place at the identical instant of inspection. As to all of the products, the risk of loss was at all times on the offerer. No physical delivery was made, and storage and handling charges were for the offerer's account. If the purchase and selling prices announced to go into effect on April 1 had been increased as a result of bills then pending in Congress, the offerer could cancel the entire contract or be relieved of his obligation to rebuy. The offerer was free to sell the goods to another buyer even after its alleged "sale" to Commodity without incurring any penalty other than the voiding of its contract with Commodity (App. 1009). Commodity, on the other hand, did not have the right to dispose of the goods as it saw fit, but was committed to "resell" them to the offerer. Commodity did not pay for the products it "purchased," nor did the offerers pay for the products they "rebought;" the transaction being settled by one check from Commodity for the difference between the "sale" and the "repurchase" prices (for example, 2¾¢ a pound in the case of cheese).

3. *The Proceedings Below*

In response to a congressional inquiry, the Comptroller General in 1955 ruled that Announcement Da-112 was beyond the authority of the Secretary of Agriculture on the ground that the transactions

were not "purchases" within the meaning of the Agricultural Act of 1949. He therefore determined that payments made to manufacturers and handlers pursuant to the program were improper (App. 856-861). Accordingly, after demands for restitution proved unavailing, suits were instituted by the United States in the spring of 1956 to recover these payments. Petitioners then filed this action, seeking a declaratory judgment as to the validity of the transactions in question.[5]

The district court, agreeing with the Comptroller General's ruling, entered judgments against petitioners in the total amount of $1,062,092.27 plus interest thereon from the date repayment was demanded (App. 1045). The court held that the Da-1?2 transactions were not "purchases" within the meaning of the Act (nor within the meaning of that term as it is normally used in commercial practice) and hence were not authorized (App. 1044-1045).

The court of appeals unanimously affirmed the judgment of the district court insofar as it held that the transactions involved were unauthorized (Pet. 28-47).[6] The court cited with approval the holding

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[5] *United States* v. *Kraft Foods Co.* was originally filed in the district court for the Eastern District of Pennsylvania, but has since been dismissed upon the stipulation that it will be controlled by the instant action (Pet. 8). *United States* v. *H. J. Heinz Co.* was also brought in the district court for the Eastern District of Pennsylvania, but it was transferred to the Western District of Wisconsin and consolidated with this case pursuant to 28 U.S.C. 1404(a) (App. 985).

[6] However, the court reversed the allowance to the Government of pre-judgment interest.

in *Swift & Co.* v. *United States*, 257 F. 2d 787 (C.A. 4), certiorari denied, 358 U.S. 837, that Da-112 transactions did not constitute "purchases" in any normal sense of the word (Pet. 41-44). Accordingly, the court concluded that, since the payments to petitioners were not authorized by the Act, Commodity was entitled to recover them (Pet. 44).

ARGUMENT

1. The question decided by the court below—*i.e.*, that the transactions involved here were not "purchases" within the meaning of that term as used in the Agricultural Act of 1949 (Pet. 14)—does not warrant review by this Court. The issue is not one of general importance nor is there a conflict of decisions with respect to it. To the contrary, all of the decisions on this question, both in the courts of appeals and in the district courts,[7] are in unanimous accord. Moreover, in another case involving the identical Announcement Da-112 program, this Court has already denied certiorari. See *Swift & Co.* v. *United States*, 257 F. 2d 787 (C.A. 4), certiorari denied, 358 U.S. 837, rehearing denied, 358 U.S. 901.

Announcement Da-112 instituted a novel program, lasting less than 45 days, that differed from the nor-

[7] Petitioners' contention (Pet. 12) that the court below "did not afford petitioners . . . independent review", but "attributed unwarranted significance" to the denial of certiorari in *Swift*, can hardly be squared with the careful and elaborate consideration by the court below, in a 18-page opinion (Pet. 28-45), of each of petitioners' various contentions and suggestions.

mal program which had been universally followed under the 1949 Act, and which has never been departed from before or since the Da-112 plan. It was a response to a set of economic circumstances that had never arisen before and, contrary to petitioners' assertions, one which is not likely to recur.

2. The decision of the court below is plainly correct and is in accord not only with the Comptroller General's decision, but also with the decisions of the two other courts of appeals which have considered the question. See *Swift & Co.* v. *United States*, *supra;* and *Land O'Lakes Creameries, Inc.* v. *Commodity Credit Corp.*, 265 F. 2d 163 (C.A. 8). Both *Swift* and *Land O'Lakes* were virtually identical to the instant action. There is no merit to petitioners' attempted technical distinction between *Swift* and the present case.[8]

Although the Da-112 transactions, found to be invalid by the court below, were clothed in terms of

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[8] Petitioners contend (Pet. 14) that *Swift* is inapposite here for the sole reason that the defendants in that case emphasized that the transacions involved complied with the economic incidents of a purchase, while in the instant action petitioners rely upon the legal definition of the term. However, in its opinion in *Swift* (257 F. 2d at 794), the Court of Appeals for the Fourth Circuit carefully examined the Da-112 transactions and concluded that "the so-called sales of cheese and butter by the processors were not purchases by [Commodity] in any normal sense of the word." Moreover, the briefs filed in *Swift* were by no means limited to purely economic considerations, but were also directed towards the legal construction of the term "purchases" as it was used in the Act. *E.g.*, the Government's brief in the Fourth Circuit, No. 7579, at pp. 15-21, *Swift & Co.* v. *United States*, *supra*.

"purchase" and "sale", it is apparent that they were paper transactions amounting to nothing more than payments to offset inventory. No physical delivery was made or intended. Storage and handling charges were all "for the account of the offerer." Although risk of loss normally accompanies transfer of title, in Da-112 transactions the risk of loss was retained by the manufacturers and handlers. The Government did not have the right to sell the products to other parties but was obligated to "resell" them at a loss to the vendors. On the other hand, the processors not only retained physical possession of the goods as part of their inventories but also full power to dispose of them in any manner they wished without incurring any liability to the Government. If the support level actually put into effect on April 1 were higher than that announced on March 4, the processors could cancel their entire obligations. The Commodity Credit Corporation did not pay for the products which the processors purported to buy back, both transactions being settled by a single government check for the loss which Commodity agreed in advance to assume.

Furthermore, there can be no doubt that, under the normal program, the cheese covered by Da-112 transactions would not have been sold outright to CCC with the idea of buying it back after April 1. Much of it was worth more than 37¢ per pound because of its age or moisture content, and there was no guarantee under the normal program that the identical cheese could be repurchased. In addition, the substantial charges for repackaging required

under the normal program (but not under Da-112) would have prevented many sales. And, finally, since market prices of cheese after April 1 would be approximately 32¼¢ a pound, manufacturers and handlers presumably could get all of the cheese they needed, other than seasoned cheese, by purchases from the commercial market at that price without having to pay the higher 34¼ price to Commodity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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AUGUST 1959

APPENDIX

The Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U. S. C. 1421, *et seq.*, provides in pertinent part:

7 U. S. C. 1421.

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *

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7 U. S. C. 1426.

The Secretary shall, insofar as practicable, announce the level of price support * * * in advance of the beginning of the marketing year * * * but the level of price support so announced shall not exceed the estimated maximum level of price support specified in this Act, based upon the latest information and statistics available to the Secretary when such level of price support is announced; and the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

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7 U. S. C. 1429.

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*,

That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act;

* * * *

7 U. S. C. 1446.

The Secretary is authorized and directed to make available ** * * price support to producers for * * * milk, butterfat, and the products of milk and butterfat as follows:

* * * *

(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat.

7 U. S. C. 1447.

The Secretary is authorized to make available through loans, purchases, or other operations price support to producers for any nonbasic agricultural commodity not designated in section 1446 of this title at a level not in excess of 90 per centum of the parity price for the commodity.

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